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May 17, 2006

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VIA HAND DELIVERY

The Honorable Charles Terreni
Chief Clerk/Administrator
South Carolina Public Service Commission
101 Executive Center Drive
Columbia, South Carolina 29210

RE: Intrastate Universal Service Fund Implementation Proceeding
Docket No.: 97-239-C

Dear Mr. Terreni:

Enclosed are the original and ten copies each of (1) Answer of Verizon Wireless to Petition of SCCTA and (2) Motion to Dismiss in Part or Stay the Petition of SCCTA, both of which are submitted for filing on behalf of Celco Partnership d/b/a Verizon Wireless in the above matter. I would appreciate your acknowledging receipt of these documents by date-stamping the extra copy of this letter enclosed and returning it to me via the courier.

By copy of this letter, I am serving all parties of record with a copy of the Answer and Motion and have enclosed a certificate of service to that effect. If you have any questions, or need additional information, please do not hesitate to contact me. With best regards, I am

Sincerely,

WILLOUGHBY & HOEFER, P.A.



Benjamin P. Mustian

BPM/amw

cc: parties of record

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

DOCKET NO. 97-239-C

Re: Intrastate Universal Service Fund)
 Implementation Proceeding)
_____)

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one (1) copy of each (1) **Answer of Verizon Wireless to Petition of SCCTA** and (2) **Motion to Dismiss in Part or Stay the Petition of SCCTA** on behalf of Cellco Partnership d/b/a Verizon Wireless by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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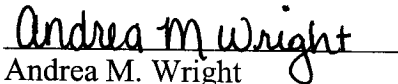
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Andrea M. Wright

Columbia, South Carolina
This 17th day of May, 2006

BEFORE THE
PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 1997-239-C

Re:)	
)	
Intrastate Universal Service Fund)	VERIZON WIRELESS
)	MOTION TO DISMISS IN PART
)	OR STAY THE PETITION OF
)	SCCTA
_____)	

CELLCO Partnership, d/b/a Verizon Wireless (“Verizon Wireless”), an Intervenor and party of record in the above-captioned docket, by and through its undersigned counsel, pursuant to 26 S.C. Code Ann. Regs. R. 103-840 (1976) and 103-841 (Supp. 2005), hereby moves to dismiss in part the April 5, 2006, Petition of the South Carolina Cable Television Association (“SCCTA”) in Support of the Office of Regulatory Staff’s (“ORS”) Petition and to Raise Additional Issues.¹ Alternatively, Verizon Wireless moves that the Petition of SCCTA be stayed. In support of its motion, Verizon Wireless would respectfully show unto this Honorable Commission as follows:

Background

On March 17, 2006, ORS filed with the Commission a Petition in the instant docket seeking an order clarifying the Universal Service Fund (“USF”) Guidelines for South Carolina in certain respects and requesting expedited relief. [“ORS Petition”.] Among other issues raised, the ORS Petition specifically requests clarification as to “whether under current Commission orders, broadband and wireless services revenues should be included in the intrastate USF

¹ Contemporaneously herewith, Verizon Wireless is filing an answer to the SCCTA petition.

assessment” and a declaratory ruling that “revenues from broadband and wireless services should not be included in the Fund assessment based on current Commission directives.” [ORS Petition at 3, 4.] In so doing, ORS indicates its understanding of the Commission’s prior orders in this docket to determine that wireless service revenues are not to be included in the State USF. [ORS Petition at 4.] ORS specifically states that it is not requesting the Commission to reconsider or reexamine its determination in this regard. *Id.*

On April 6, 2006, SCCTA filed a petition with the Commission purporting to support ORS’s petition. (“SCCTA Petition”) Therein, the SCCTA acknowledges that this Commission has previously determined that wireless revenues are not to be included in the State USF. [SCCTA Petition at 2.] However, and inconsistent with the ORS Petition, the SCCTA Petition requests that the Commission revisit the issue of including wireless revenues in the State USF. *Id.*²

Motion to Dismiss

SCCTA Lacks Standing to Raise the Issue of Whether Wireless Revenues Should be Assessed for Purposes of the State USF and has Failed to State a Claim

SCCTA lacks standing to raise the issue of whether, and has failed to state facts sufficient to constitute a claim that, wireless revenues should be included in the State. SCCTA has failed to establish that it meets the threshold requirements for standing under South Carolina law and has not stated the factual basis required under the pertinent statute to raise a claim with respect to this issue. Therefore, the SCCTA Petition in this regard should be dismissed.

² SCCTA also petitions the Commission to amend certain aspects of the guidelines adopted in its prior orders relating to the size and oversight of the fund and whether any Carriers of Last Resort (“COLRs”) are receiving USF support based on access lines which are sold as part of a package of bundled services. Should the Commission be disposed to consider these issues at all (see n. 4, *infra*), such consideration should not be undertaken at this time for the reasons discussed in the section addressing Verizon Wireless’s alternative motion for a stay below.

Standing

Standing is a “fundamental requirement.” Blandon v. Coleman, 330 S.E.2d 298, 299 (S.C. 1985). The determination of standing is one of subject matter jurisdiction, because if a party does not have standing, it does not have a justiciable case or controversy before the Commission. See Carolina Alliance for Fair Employment v. S.C. Dep’t of Labor, Licensing & Regulation, 523 S.E.2d 795, 800 (S.C. Ct. App. 1999) (stating, in a discussion of standing: “The existence of an actual controversy is essential to jurisdiction to render a declaratory judgment.”); Dockside Ass’n, Inc. v. Detyens, Simmons, and Carlisle, 330 S.E.2d 537, 539 (S.C. Ct. App. 1985). The South Carolina Supreme Court has analyzed this “irreducible constitutional minimum of standing” under the 3-part framework that the U.S. Supreme Court has long used:

First, the plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’ Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

Sea Pines Ass’n for the Protection of Wildlife, Inc. v. S.C. Dep’t of Natural Res., 550 S.E.2d 287, 291 (S.C. 2001) (quoting, with internal citations omitted, Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-61 (1992)); see also Beaufort Realty Co. v. Beaufort County, 551 S.E.2d 588, 589 (S.C. Ct. App. 2001) (quoting and applying 3-part test of Lujan).

SCCTA has failed to allege an “actual or imminent” injury.

[A] private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom. Such imminent prejudice must be of a personal nature

to the party laying claim to standing and not merely of general interest common to all members of the public.

Baird v. Charleston County, 511 S.E.2d 69, 75 (S.C. 1999); see Culbertson v. Blatt, 9 S.E.2d 218, 221 (S.C. 1940), quoting Ex parte Levitt, 302 U.S. 633, 633 (1937).

In applying South Carolina's standing jurisprudence to the present facts, it is apparent that SCCTA has suffered no injury and that no injury is imminent. SCCTA does not offer any local telecommunications service in South Carolina with which a wireless telecommunication service could compete. Cf. S.C. Code Ann. § 58-9-280 (E)(3) (Supp. 2005). Nor does SCCTA provide a service to "an indentifiable group of customers in an exchange, group of exchanges, or other clearly identified geographical area" for which "the service, its functional equivalent, or a substitute service is available" from a wireless service provider. S.C. Code Ann. §58-9-280(G)(1) (Supp. 2005). Where the language of a statute is plain, unambiguous and conveys a clear meaning, there is no need to apply rules of statutory interpretation. Tilley v. Pacesetter Corp., 366 S.C. 361, 585 S.E.2d 292 (2003). The plain meaning of the foregoing statutory language is that only a telecommunications provider subject to competition with respect to the provision of a local telecommunications service to its customers in a specific portion of its service area is entitled to assert that a wireless service constitutes "competition" warranting the inclusion of wireless revenues in the State USF. Moreover, if there were any ambiguity in that regard, this Commission has in this docket already read the statute in the foregoing manner. [See Order No. 2001-419, at 36 ("As pointed out by Mr. Walsh, there has not been sufficient evidence in this proceeding **that any wireless communications service provider competes with any local exchange service provider** in South Carolina.") (Emphasis supplied.)] The Legislative Audit Council, whose report SCCTA purports to rely upon to support its Petition, also accepts the Commission's reading of the statute. [See "A Review of the South Carolina Universal

Service Fund”, February, 2005, at 15-16 (“South Carolina law requires all telecommunications providers (including wireless) to contribute to the USF *if* the PSC determines that the company is providing services that compete with **a local telecommunication provider.**” (*Emphasis in original.*)(**Emphasis provided.**); “a **carrier** could petition the PSC to require wireless carriers to contribute.” (Emphasis supplied.)]

SCCTA is not a carrier authorized to provide a local telecommunications service in South Carolina. Accordingly, SCCTA does not have any identifiable group of customers in a specific area for which the functional equivalent of or a substitute for any of its service is available from two or more providers. Thus, to the extent that the exclusion of wireless revenues from the State USF could be asserted to cause an injury (which is disputed), SCCTA cannot point to any fact demonstrating that it has suffered such an injury. Accordingly, SCCTA has no standing to raise the issue of including wireless revenue in the State USF and its Petition should be dismissed.³

Failure to State Facts Sufficient

Even assuming that SCCTA had standing to raise the issue of including wireless revenues in the State USF, it has failed to state facts sufficient to give rise to a claim that a wireless provider should be required to contribute to the State USF under § 58-9-280 (E)(3). As already noted, the Commission may only require that a wireless provider participate in the State USF if it determines that a wireless provider is competing with a local telecommunications service of another telecommunications provider. In order for that to occur, a local telecommunications provider must specify (a) a wireless provider that is competing with it, (b) an identifiable class or

³ Further, SCCTA’s “association” status does not permit it to avoid the threshold inquiry into the appropriateness of SCCTA’s raising of the issue of inclusion of wireless revenues in the State USF. “An association has standing . . . only if its members would have standing in their own right.” Arizonans for Official English v. Arizona, 520 U.S. 43, 65-66 (1997). Thus SCCTA must demonstrate that its members would have standing to raise these specific issues. See Energy Research Found. v. Waddell, 367 S.E.2d 419 (S.C. 1988) (affirming dismissal of groups on the basis of lack of standing because there was no showing of standing for any member). Nowhere in the SCCTA Petition is any fact or matter alleged that would confer standing on any of its members to raise this issue.

group of the local telecommunications provider's customers to which competing services are available, and (c) the exchange, group of exchanges or other clearly defined geographical area in which the competing services are made available. See § 58-9-280 (G)(1). Additionally, the wireless provider whose service is alleged to compete with that of a local telecommunications provider must be given notice and an opportunity to be heard. See § 58-9-280(E)(3). The SCCTA Petition fails to identify any specific wireless provider, any local telecommunications provider whose service is subject to competition from that wireless provider, the class or group of local provider customers, or the exchange, group of exchanges or geographical area of a local provider affected.⁴ Thus, the required notice to the affected wireless provider, local service provider and local service customers cannot be given. See §58-9-280(E)(3); also see S.C. Const. art. I, §22. In the absence of factual allegations addressed to these statutorily required factors, no claim is stated and SCCTA's Petition should therefore be dismissed insofar as it seeks to have the Commission determine that wireless revenues should be included in the State USF on the ground that it fails to state sufficient facts to constitute a claim. *Cf.* Rule 12(b)(6), SCRCP.⁵

Alternative Motion to Stay

Should the Commission not be disposed to dismiss the portion of the SCCTA Petition pertaining to wireless revenues or to dismiss the SCCTA Petition as an impermissible collateral attack on the Commission's prior orders in this docket, the Commission should stay the entirety

⁴ The Commission may take notice that competitive local exchange carriers affiliated with SCCTA's membership have limited authorized service areas such that it would not be possible for SCCTA to claim that the entire State is subject to competition from wireless providers with respect to basic local exchange service provided by SCCTA members.

⁵The SCCTA Petition also appears to be an impermissible collateral attack upon the Commission's earlier orders in this docket. A "collateral attack is defined as an attempt to avoid, defeat or evade a judgment or deny its force and effect in some judicial proceeding not provided by law for the express purpose of reviewing it." *United Merchants & Mfrs. v. SCE&G*, 113 F. Supp. 257, 262 *aff'd* 208 F.2d 685 (W.D. S.C.1953). "Decisions of quasi judicial tribunals acting within their jurisdiction are impervious to collateral attacks and open to avoidance by a court only in a direct attack on the ground of clear error of law, fraud or mistake." *Id.* SCCTA seeks to have the Commission examine certain aspects of its prior orders in this docket. To the extent that the granting of relief to SCCTA would

of the SCCTA Petition until such time as the Supreme Court of South Carolina has had an opportunity to rule upon the appeal taken by SCCTA from the Commission's prior orders in this docket.

By its appeal, the SCCTA has sought to have the Commission's prior orders in this docket reversed as they pertain to "cost" determinations and the "growth" of the State USF. See, e.g. Brief of Appellants South Carolina Cable Television Association and Southeastern Competitive Carriers Association to Supreme Court of South Carolina at pp. 9-13, 16-21 and 24 (copies attached.) In its instant petition, the SCCTA challenges the USF guidelines on the ground that they do not provide for an annual review of relevant COLR "costs and charges." [SCCTA Petition at 5.] Verizon Wireless submits that the arguments advanced by SCCTA to the Court and this Commission are indistinguishable, both relying upon S.C. Code Ann. §58-9-280(E)(4) in support of the proposition that the Commission's prior orders fail to examine relevant costs and charges. [*Cf.* "[t]he current guidelines do not provide for such oversight. Some carriers of last resort have not had any such review of costs and charges since the USF was first established" (SCCTA Petition at 5) and "[the] fund would be necessarily oversized, because the Commission's approach in calculating the USF mismatches costs and revenues in violation of S.C. Code Ann. Section. 58-9-280(E)."]]

South Carolina law is well settled that where the parties and issues are identical in two different actions, the pendency of one action may authorize the stay of the other to determine whether the disposition of the first action "may not settle all." Rush v. Thompson, 203 S.C. 106, 112, 26 S.E.2d 411, 413 (1943); see Talley v. John-Mansville Sales Corp., 285 S.C. 117, 328 S.C.2d 621 (1985); see also H.J. Heinz Co. v. Milnot Holding Corp., FTC Docket No. 9295,

bear upon issues which are currently pending before the appellate courts, Verizon Wireless respectfully submits that the Commission would be warranted in dismissing the SCCTA Petition as an improper collateral attack.

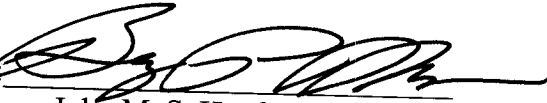
2001 FTC LEXIS 6 (Jan. 17, 2001) (staying a federal administrative proceeding until the resolution of an appeal pending before the United States Court of Appeals for the District of Columbia Circuit). Here, the SCCTA's appeals of the Commission's earlier orders in this docket may answer the identical questions currently placed before the Commission by the SCCTA Petition. As in the Heinz case, the decision of the appellate court "will determine the outcome or, at the very least, substantially shape the course of administrative proceedings in this matter." Heinz, 2001 FTC LEXIS at *2. Similarly, "[a]ny further action in this administrative forum at this time runs the risk of being obviated by the opinion of the [appellate court]." *Id.* at *3. Accordingly, a stay of the instant Commission proceeding is in order and appears to be an appropriate and prudent action to take until SCCTA's appeals are resolved. A stay is appropriate to permit the Supreme Court to address the SCCTA's challenges to the Commission's earlier orders in this docket and give the Commission and parties the benefit of the Court's ruling.

WHEREFORE, having fully set forth its Motion, Verizon Wireless requests that the Commission dismiss all or a portion of the SCCTA Petition for the reasons set forth above. Alternatively, Verizon Wireless requests that the SCCTA Petition be stayed pending a resolution of the SCCTA appeal now under consideration by the Supreme Court.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

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